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UNITED STATES *v.* HVOSLEF: A CONSTITUTIONAL SOURCE OF NATIONAL REVENUE IMPAIRED.

ALTHOUGH the case of *United States* v. *Hvoslef*,[1] decided in March, 1915, seems to have attracted but little attention, it adds, it is believed, a serious curtailment to the power of Congress to raise revenue, and at a time when every financial resource of the government is needed for purposes of national defense. It seems desirable, therefore, to examine the grounds of this decision in the light of former opinions of the Supreme Court for the purpose of considering whether the conclusions of the Court must be accepted as a final determination of the constitutional questions involved.

I

In discussing any question involving the construction of a clause of the Constitution of the United States, it is helpful to have definitely stated the writer's view concerning the nature and character of the Constitution itself, and the extent to which the decisions of the United States Supreme Court must be considered as finally determining the meaning of that instrument; not final merely so far as coördinate branches of the government are concerned, but as to how far they are to be considered as binding the future action of the Court itself.

[1] 237 U. S. 1.

It seems obvious to the writer that the one view of the Constitution giving security and permanency, and sustained by reason and authority, is that it is an unchanging instrument of government, amendable only in the manner provided by its terms, and that except as so amended it remains precisely the same in meaning as when first ratified.[2] If the view were accepted that the meaning may be modified by decisions of the courts, then there would be no constitutional guarantee of personal liberty or of the security of property, and few means of national defense which might not be glossed out of existence or greatly weakened by judicial interpretation. There seems to be no sure anchorage except in a firm adherence to the principle that while judicial, governmental, and public opinion in regard to its meaning may change, the Constitution itself does not change, and that in case of erroneous interpretation the way is always open to a return to the true construction whenever further consideration and additional light make such error clear. The Supreme Court itself, by adhering in practice to its right at all times to reëxamine the terms of the instrument for the purpose of determining its meaning, and to subject every decision upon a constitutional question to the acid test of reason, has fixed the enduring character of the Constitution, and added immensely to its own strength and dignity by making itself the living voice through which that document speaks. The wisdom of the position taken by the Court is apparent when it is remembered that even in passing upon constitutional questions, the court must depend to some extent upon the industry and research of counsel before it, that points of controlling importance may, at times, escape the attention of the most diligent, and that while a question of constitutional construction may appear of relatively

[2] The impression, so generally current, that the Constitution does change, at least by growth, results, it is believed, from the fact that with the development of new conditions, new and often theretofore unthought of means are discovered which are "necessary and proper for carrying into execution" the powers of the National Government, but which, had they been enacted into law at a former time, might either have then had no such relation to any delegated power of the Government as to make them necessary and proper means for executing it, or a relation which would not, at that time, have been apparent. In other words, it is plain that it is we, our knowledge, and our circumstances, that change, and not the Constitution. Here it may be suggested that it may well be, as the writer believes, that the scope of the powers specifically granted by the Constitution has never been more than partially canvassed or explored.

slight importance at the time it is originally presented, it may thereafter become of the greatest moment.

It is with these considerations in mind that the writer desires to analyze the case of *United States* v. *Hvoslef*, and discuss it in the light of previous decisions of the Court.

II

In this case, the Court of Claims had allowed defendant in error judgment upon a claim for amounts paid as stamp taxes upon certain charter parties under section 25 of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 460. These charter parties were exclusively for the carriage of cargoes from ports in States of the United States to foreign ports, and the imposition of the taxes was held by the Court of Claims to be in violation of section 9, article 1, of the Constitution of the United States, which provides that, "No tax or duty shall be laid on Articles exported from any State." Mr. Justice Hughes, in delivering the opinion of the Court which sustained the action of the Court of Claims, said, in substance, that the constitutional freedom of exportation involved more than a mere exemption from taxes or duties laid specifically upon the goods themselves, that a tax on these charter parties was, in substance, a tax on exportation, and a tax on the exportation was a tax on the exports. Mr. Solicitor General Davis and Mr Megaarden, for the United States, had contended that as the tax extended to all charter parties irrespective of whether the vessels were to be used in the export trade or not, it affected exportation only incidentally, and therefore the case was to be distinguished from one where burdens were specifically laid on any of the processes or incidents of exportation as such. The Court held this to be immaterial, saying that "the tax as applied to the charter parties here in question was nothing else than a tax on exportation and to this extent was, in any event, invalid,"[3] (quoting from *Robbins* v.

[3] *Id.*, p. 18. It may be remarked here that the position of counsel for the Government seems obviously sound. There is, in any view of the matter, a very clear distinction between a tax upon instruments of a given class, predicated upon the fact that they are to be used in connection with exportation, and a tax levied upon a given instrument, irrespective of whether it is used in connection with exportation or not. The distinction is referred to in the Fairbank case, *infra*, where the majority of the court, speaking through Mr. Justice Brewer, said, p. 290: "It must be noticed that by this act of

Shelby Co.,[4] and citing the State Freight Tax Case[5]). The Court's main reliance, however, was upon the opinion of Chief Justice Marshall in *Brown* v. *Maryland*,[6] and the opinion of the majority of the Court in *Fairbank* v. *United States*.[7]

III

At the outset it may be said that the case of *Brown* v. *Maryland* is of peculiar interest and importance historically and judicially. It is no reflection upon that great commonwealth to say that from the beginning Maryland had been a somewhat obstreperous member of the new union, for this was the second time that it had been brought before the bar of the United States Supreme Court to defend enactments directly impairing powers of the Federal Government. The first had been, of course, in the case of *M'Culloch* v. *Maryland*,[8] which drew in question an attempt on the part of that State to tax the United States National Bank.

In *Brown* v. *Maryland*, the Maryland Legislature had enacted "that all importers of foreign articles, etc., shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars." This, of course, struck a vital blow at the exclusive dominion of the Federal Gov-

1898 while a variety of stamp taxes are imposed, a discrimination is made between the tax imposed upon an ordinary internal bill of lading and that upon one having respect solely to matters of exports. An ordinary bill of lading is charged one cent; an export bill of lading ten cents. So it is insisted that there was not simply an effort to place a stamp duty on all documents of a similar nature but by virtue of the difference an attempt to burden exports with a discriminating and excessive tax."

It will be seen, however, that the Court in the Hvoslef case took the position that it was immaterial whether an instrument used in connection with exportation was singled out on account of that use, or was subjected to an undiscriminating tax as an instrument of a general class, used indifferently in domestic and export trade; but, on the other hand, held that every tax which affected exportation even in the slightest degree, whether incidentally or designedly, was prohibited by the terms of section 9 of article 1. The logic of the Court's position, of course, exempts from all governmental burden every contract, bill of exchange, check, note, lease or agreement made in connection with the processes of exportation. It is not the writer's main purpose, however, to discuss the distinction between taxes laid on instruments used in exportation, as such, and taxes on commercial instruments generally, but rather to discuss the general question of whether such taxes, however laid, come within the scope of the constitutional restriction.

[4] 120 U. S. 489 (1887).
[5] 15 Wall (U. S.) 232 (1872).
[6] 12 Wheat. (U. S.). 419 (1827).
[7] 181 U. S. 283 (1901).
[8] 4 Wheat (U. S.) 316 (1819).

ernment over the most efficient source of revenue sought to be secured to it by the Constitution, and attempted to open the door again to those harassing regulations of foreign trade by the States which had been in a large measure the immediate cause of the Federal Convention. The Federal Government met this challenge just as it had done in the former case, by entering the appearance of its Attorney General, Mr. Wirt, as counsel for the appellants, and making their cause its own. The Government, of course, took the very firm ground that the Maryland statute was repugnant to the constitutional provision that "no State shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and to that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The first question, then, was, what was the meaning of the words "imposts or duties on imports or exports?"

Mr. Chief Justice Marshall after pointing out the broad meaning of the word "imports," and that the scope of the language was broadened, if possible, by the statement of that single exception in favor of inspection laws, which, if unstated, would presumably have been within the scope of the inhibition, and by the character of the evil sought to be avoided, which could not have been cured without giving the broadest possible interpretation to the language used, concluded that a tax upon importers was included within the term "any imposts or duties on imports." The Maryland statute was, of course, a palpable attempt on the part of a State to invade the field of taxation from which it had been expressly inhibited.

The answer to the second question as to whether the tax was also repugnant to the clause empowering "Congress to regulate commerce with foreign nations," etc., the Court found to be even more obvious than the answer to the first. For the State to say that no one shall engage in the business of an importer without first securing a license from the State, is a direct regulation of commerce with foreign nations, and an invasion of the power granted exclusively to Congress. The Chief Justice well says,

"The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject.

It is too obvious for controversy that they interfere equally with the power to regulate commerce."[9]

Unfortunately, however, the learned jurist, in discussing the limitation on the powers of the States imposed by the provision in question, referred by way of argument to the limitation upon the powers of Congress contained in the section now under consideration. He said:

"The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would the Government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"[10]

Now, of course, the question of the powers of Congress, as affected by section 9, was not before the Court for adjudication. The sole question was as to the power of the States, and no one would have been more surprised than the great Chief Justice himself, if it had been suggested that what he might say by way of argument would, in such circumstances, be taken as finally fixing a definite limitation of the powers of the Federal Government.[11] It is submitted with great deference that when he said, with respect to the provisions forbidding the States to lay any imposts or duties on imports or exports, and the provision with respect to Congress

[9] 12 Wheat. (U. S.) 419, 448.

[10] *Id.*, 445.

[11] He had already said, in Cohens *v.* Virginia, 6 Wheat (U. S.) 264, 399 (1821): "The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the Court, in the case of Marbury *v.* Madison.

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered to its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

that no tax or duty shall be laid "on Articles exported from any State," that "there is some diversity in language, but none is perceivable in the act which is prohibited," he spoke without having that point before him for adjudication, and was in error, for there is not only diversity in language, but a wide difference perceivable in the meaning of the language used. At the very outset, in discussing the meaning of the word "imports," he had said; "What, then, are 'imports?' The lexicons inform us, they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country." When, however, he follows this up by saying; "'A duty on imports,' then, is *not merely a duty on the act of importation*, but is a duty on the thing imported,"[12] he shows not only that he understands the word in its true sense, and as comprehending both the articles imported and the acts of importation, but that he realizes that a duty on importation is the first meaning that strikes the mind when the phrase "a tax on imports" is used. The primary meaning of the word "import" given in the lexicons is "importation," and whether this is accepted as the primary or secondary meaning of the word, the word "imports" has, and by the very statement of the learned Chief Justice at that time had, a broad and general significance including both the articles themselves, and the acts of importation. The same is true with respect to the word "exports."

There is, then, a very marked difference perceivable in the language used with respect to the States and the language used with respect to the United States. In the one case, very broad and inclusive language is used, and it is followed by an exception which strengthens the general and inclusive scope of the prohibition. In the case of the United States government the prohibition is narrowed and specifically confined to taxes and duties on "Articles exported," and the limited scope of the prohibition is emphasized by adding the very significant words, "from any State." This difference in meaning is brought out even more clearly when we compare what Chief Justice Marshall says with reference to the circumstances which called forth the inhibition laid upon the action of the States with reference to imports and exports, with the reason which impelled the Convention to prohibit Congress

[12] 12 Wheat. (U. S.) 419, 437; the italics are the writer's.

from laying a tax or duty upon "Articles exported from any State." After he had called attention to the broad meaning which must be attached to the general words of the prohibition upon the States in regard to duties and imposts on imports and exports, made necessary by the statement of a single exception in favor of duties for the support of inspection laws, he said:

"If we quit this narrow view of the object, and passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

"From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed."[13]

Writings contemporaneous with and immediately preceding the Constitutional Convention amply corroborate this statement. The mischief, then, sought to be prevented was any intermeddling by the States with the subject matter of importation or exportation, a result which could only be accomplished by giving to the language used a broad and inclusive meaning. Indeed, the prohibition itself must be read in conjunction with the power of Congress "to regulate commerce with foreign nations," which by its very terms includes every sort of action bearing upon the subject matter of imports and exports, and when so considered, must of necessity exclude the idea of any intermeddling with either by the States.

But when we come to the provision that "no tax or duty shall be laid upon Articles exported from any State," we find that not only is the language itself narrow and specific, but the object sought to be accomplished is of a very different character.

Turning to the debates in the Constitutional Convention, it will be seen that there was no general objection to the power of Congress to tax exports. Mr. Madison, Mr. Wilson, and Mr. Gouverneur

[13] 12 Wheat. (U. S.) 438.

Morris were strenuous in opposing any limitation on that power, and in this they had the support of General Washington.[14] There had, of course, been no similar power in the general government, and we can only learn the mischief sought to be prevented by examining the text of the prohibition itself, and what was said in the debates in the Convention in regard to it. The language used is, as has been pointed out, confined to taxes or duties laid on "Articles exported from any State." The vital objection made to the existence of a power in Congress to tax articles so exported, was that it was "unjust and alarming to the Staple States;" that there were eight northern States with an interest different from the five southern States, and that the "Southern States had, therefore, ground for their suspicions. The case of exports was not the same as that of imports. The latter were the same throughout the States; the former were very different."[15] Mr. Gerry feared that the power would be used to compel the States to comply with the will of the General Government.[16] Mr. Butler was strenuously opposed to a power over exports as alarming to the Staple States.[17] In other words, the impelling motive was a fear that the power to tax articles exported would be used by the majority to oppress the minority through the laying of export duties on the staples or other articles exported from those States. The purpose, therefore, was to prevent the imposition of a tax or duty on specific articles.

It therefore appears that in the one case, in order to protect the exclusive jurisdiction of Congress over foreign commerce and for other equally compelling reasons, it was necessary to exclude the States from any intermeddling in the matter of exports or imports, and for that purpose the Convention used broad and general language, strengthened by the statement of a single exception, and made absolute in scope by the clause which invested Congress with power to regulate commerce with foreign nations; in the other, it was desired to protect the southern States from discriminating burdens upon "Articles exported" from those States (a "security" which they vehemently demanded) and for that purpose appropriately narrow and specific terms were used, which did no more than prohibit Congress from laying taxes or duties upon the articles themselves.

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[14] 2 THE CONSTITUTIONAL CONVENTION OF 1787 (Hunt's ed.), pp. 213, 216.

[15] *Id.*, 215, Col. Butler; see also *id.*, 177. [16] *Id.*, 216. [17] *Id.*, 214.

IV

Fairbank v. *The United States*,[18] the other authority upon which the Court mainly relied in the Hvoslef case, called in question the validity of schedule A, section 6 of the Act of June 13, 1898, which required a ten-cent revenue stamp to be affixed to every bill of lading or receipt (other than charter parties) for goods, merchandise or effects to be exported from the United States to any foreign port. A bare majority of the Court held this to be in conflict with section 9 of article 1. The portion of the argument of the Solicitor General quoted by Mr. Justice Brewer seems most persuasive:

"To give Congress the power to lay a tax or duty 'on articles exported from any State,' meant to authorize inequality as among the States in the matter of taxation. If the North happened in control in Congress, it might tax the staples of the South; if the South were in power, it might place a duty on the exports of the North. As a part, therefore, of the great compromise between the North and the South, this clause was inserted in the Constitution. The prohibition was applied not to the taxing of the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country, but to the laying of a tax or duty on the *articles exported*, for these could not be taxed without discriminating against some States and in favor of others."[19]

The answer of the learned Justice, speaking for the majority of the Court, does not seem convincing. He says:

"This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition."

It may be helpful to interrupt at this point to say that the argument of the Solicitor General does not appear to be fairly stated by the learned Justice. It was, in effect, that a stamp tax of the kind

[18] 181 U. S. 290. [19] *Id.*, 292.

under consideration was neither within the letter of the constitutional prohibition nor within its spirit. Mr. Justice Brewer's statement that "if mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition," is clearly beside the point, for an *ad valorem* tax upon all exports would clearly be a tax upon "Articles exported," and therefore within the express prohibition of the clause. If the framers of the Constitution had excepted from the prohibition, *ad valorem* duties, they would, no doubt, have accomplished the entire object for which the prohibition was framed, but they did not do so. The fact, however, that the framers of the Constitution used language that was more comprehensive than was necessary to avoid the evil sought to be prevented, is most assuredly not an argument in favor of extending the scope of the prohibition beyond the literal meaning of the words.

The opinion of the majority of the Court continues:

"But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation, all exportation, shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word 'duty' the words 'for the purpose of revenue' but the motion was voted down. So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports."[20]

The motion of Mr. Clymer and the action of the Convention when examined, however, show no such intention. Mr. Clymer feared to intrust Congress with power to lay taxes or duties on articles imported for the purpose of raising revenue, and made his motion accordingly.[21] If it had come after the main question had

[20] 181 U. S. 292.

[21] "Mr. Clymer remarked that every State might reason with regard to its particular productions, in the same manner as the Southern States. The Middle States may apprehend an oppression of their wheat flour, provisions, etc., and with more reason, as these articles were exposed to a competition in foreign markets not incident to Tobacco, Rice, etc. They may apprehend also combinations against them between the Eastern and Southern States as much as the latter can apprehend them between

been disposed of there might be something in the learned Justice's suggestion, but it was made before any vote upon the main question had been taken, and consequently was opposed alike by those favoring and those opposing the clause. New Hampshire, which opposed any limitation on the power of Congress to tax articles exported, voted against Mr. Clymer's motion, as did Massachusetts, which favored the proposition to allow two-thirds of each house to levy such taxes. Likewise, General Washington and Mr. Madison, who favored giving the Congress full power to tax exports, also voted against Mr. Clymer's motion as something which defeated the purpose they had in view.

In other words, of the eleven States voting, only two favored Mr. Clymer's amendment, while four, with the addition of Washington and Madison, opposed any restriction at all upon the power of Congress to tax articles exported, and five, together with Washington and Madison, voted for the two-thirds amendment. Instead of supporting the position of the majority in the Fairbank case, then, the motion of Mr. Clymer, his remarks thereon, and the action of the Convention all emphasize the fact that nothing more than a tax upon the articles themselves was intended to be prohibited.

It is submitted, therefore, that there is not a word in the clause itself, nor was there a single circumstance connected with the drafting or adoption of it which justifies the expansion of its terms in the manner stated by Mr. Justice Brewer. The majority of the Court in effect, after the lapse of over a hundred years, took it upon themselves to rewrite the terms of the clause, and to place upon the taxing power of the National Government a limitation never expressed and never intended, and not made necessary or proper by the mischief sought to be prevented. They dismiss the matter of the practical construction of the act by saying that before any appeal can be made to practical construction it must appear that the true meaning is doubtful. But obviously practical construction was rightly appealed to by those protesting against an unjustifiable expansion of the language of a constitutional limitation, although obviously that appeal ought not to have been made necessary.

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the Eastern and Middle. He moved as a qualification of the power of taxing Exports that it should be restrained to regulations of trade by inserting after the word 'duty' sect. 4, art. VII the words, 'for the purpose of revenue.'" 2 CONST. CONV. 1787 (Hunt's ed.), p. 217.

The plain, literal meaning of the prohibition excluded the idea of any restraint upon taxation except taxes or duties levied upon the articles themselves when exported from any State. If a different or wider meaning was to be given to it, it could only be because the nature of the mischief sought to be remedied required a larger meaning, and no such interpretation could be made until every legitimate means had been resorted to in determining the meaning of the provision. In other words, the only theory upon which the conclusion arrived at by the majority of the Court could be sustained, was that the prohibition had a wider scope than was signified by the literal meaning of the words actually used. If you may resort to contemporaneous, practical construction for the purpose of broadening the scope of a provision, *a fortiori* you may by the same means demonstrate that the words were used and intended to be understood in their ordinary and usual sense. What, then, had been the contemporaneous and practical construction of the clause?

On July 6, 1797, an act was passed which, among other things, provided that, "Any note or bill of lading, for any goods or merchandise to be exported, if from one district to another district of the United States, not being in the same State, ten cents; if to be exported to any foreign port or place, twenty-five cents," etc.[22] It is significant that this act was passed within eight years after the Constitution went into effect, and at a time when the framers of the Constitution were an active and dominant element in the councils of the nation; yet no suggestion was made that the tax was a tax "upon Articles exported from any State." However, when three years earlier, a tax on carriages was proposed, it was immediately challenged as unconstitutional by Mr. Madison, then a member of Congress, and the question was raised in court as soon as the law went into effect. Obviously, the tax imposed by the law of 1797 was not challenged, because it was apparent then, as it must be now, that a stamp tax upon foreign bills of lading is neither within the words nor the spirit of the prohibition contained in section 9 of article 1. It must be remembered also that the Act of 1797 was passed at a time when one great party in public life was watchfully jealous of the slightest semblance of usurpation upon the part of the Federal Government, but although the act

[22] 1 U. S. STAT. 527.

continued in force until April 6, 1802, and a similar law was in force from July 1, 1862 until June 6, 1872, the constitutionality of neither was ever questioned. The act considered in the Fairbank case went into effect July 1, 1898, and was not questioned until March, 1900. Upon this branch of the case, Mr. Justice Harlan, speaking for himself, Mr. Justice Gray, Mr. Justice White, and Mr. Justice KcKenna, said:

"Practically no weight has been given in the opinion just filed to the fact that the power now denied to Congress has been exercised since the organization of the Government without any suggestion or even intimation by a single jurist or statesman during all that period that the Constitution forbade its exercise. It is said that the question of power never was presented for judicial determination prior to the present case, and therefore this court is at liberty to determine the matter as if now for the first time presented. But the answer to that suggestion is that, in view of the frequent legislation by Congress and its enforcement for nearly a century, the question must have arisen if it had been supposed by any one that such legislation infringed the constitutional rights of the citizen. Within the rule announced in *Stuart* v. *Laird*,[23] and in other cases, the question should be considered at rest."[24]

There is, throughout the opinion of the majority of the Court in the Fairbank case, the thought that "freedom of exportation" is guaranteed by the Constitution; for instance, it is said:

"As the States cannot directly interfere with the freedom of imports they cannot by any form of taxation, although not directly on the importation, restrict such freedom, Congress alone having the power to prescribe duties therefor. In like manner the freedom of exportation being guaranteed by the Constitution it cannot be disturbed by any form of legislation which burdens that exportation."[25]

This concisely states the unwarranted premise from which the majority of the Court deduces its erroneous conclusions. The prohibition contained in section 10 in conjunction with the commerce clause does prevent the States from interfering in any way with the freedom of imports or exports, but so far as Congress is concerned, "freedom of exportation" is not and was not intended to be guaranteed by the Constitution. This is shown by the fact that embargoes by the Federal Government, which are certainly

[23] 1 Cranch (U. S.) 299 (1803).
[24] 181 U. S. 283, 323 (1901).
[25] *Id.*, 295; see also pp. 290 and 292.

not consistent with "freedom of exportation," are not prohibited and were not intended to be prohibited by the clause in question,[26] while on the other hand, when Mr. Madison suggested that to the prohibitions upon the States be added, "nor lay embargoes," it was agreed that this was already covered.[27]

Moreover, it is in accord with sound principles of construction to say that when a small, learned, deliberative body in daily session, after having a subject under consideration for over a month, and after drafting and re-drafting the instrument to be submitted, and after referring it to a committee for the purpose of harmonizing the language of the various provisions, deliberately preserves a difference in the language in which two inhibitions are expressed, it must be assumed that it intended to express a difference in meaning.

All of the cases upon which the majority of the Court in the Fairbank case rests its opinion, are cases in which the action of a State has been called in question because it contravened the prohibition with reference to "imports" or "exports" or because it was obnoxious to the provision vesting Congress with power to regulate foreign or domestic commerce. Consequently, what has been said with reference to *Brown* v. *Maryland* and *Fairbank* v. *U. S.*, applies to those cases also.

For the reasons stated, it seems clear that the opinion of the majority of the Court in the Fairbank case, in holding that the provision that no tax or duty shall be laid upon articles exported from a State, disregarded the plain language of the clause itself, disregarded the purpose intended and the mischief sought to be prevented, disregarded the contemporaneous and practical construction of the act during a period of a hundred years, and was erroneous. A regard for sound principles of interpretation demands that its words be given no larger meaning than their natural import, considered in the light of the purpose sought to be accomplished, and that this is done when they are considered as excluding only taxes and duties on the articles themselves.

V

But the Hvoslef case goes much further than the Fairbank case in curtailing the powers of Congress. In the latter, there had been

[26] 2 CONST. CONV. (Hunt's ed.), p. 215. [27] *Id.*, 264.

a discriminating stamp duty on bills of lading used in the export trade.[28] In the former, there was a general provision which applied to all charter parties whether the vessels were to be used in domestic or foreign trade. In the case following the Hvoslef case, *Thames & Mersey Marine Ins. Co.* v. *United States*,[29] the Court went a step further and held that stamp taxes on policies of marine insurance also came within the prohibition of section 9. The drastic doctrine of the court, therefore, is that any governmental burden which affects in any way the processes of exportation is unconstitutional and void. The doctrine of the Fairbank case is thus expanded and carried to its extreme and logical limit, but it is submitted that the doctrine of that case is contrary to reason and authority, and ought not to stand.

VI

The United States is at the present moment facing a grave situation, and fully understands the need it has of every legitimate and constitutional source of revenue. It stands as the one great nation in the world whose taxing power is curtailed by express constitutional limitations; limitations which deprive it of all practical means of direct taxation, except upon incomes, and of all power to lay taxes and duties on articles exported from any State. It is obvious that the common defense, the general welfare, and perhaps even the security of liberty demand that these limitations upon the power of the nation to protect itself and its citizens shall not be extended beyond their rightful and true meaning, and if in the Fairbank case, a majority of the Court has, as it is believed that it has, given to the language of the Constitution an extended meaning and a restrictive effect which cannot be supported by reason, then the ruling in that case and in those following it ought to be reconsidered and the constitutional powers of Congress fully restored.

Clarence Norton Goodwin.

CHICAGO.

[28] 181 U. S. 283, 290 (1901).

[29] 237 U. S. 19 (1915).